Supreme Court, U. S.
FILED
OCT 6 1976
MICHAEL RODAK, JR., CLERK

No. 76-2

In the Supreme Court of the United States

OCTOBER TERM, 1976

R. L. GRIFFIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

REX E. LEE,
Assistant Attorney General,

LEONARD SCHAITMAN,
LINDA PENCE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-2

R. L. GRIFFIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. I) is reported at 537 F. 2d 1130. The order of the district court (Pet. App. II) is not reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on June 8, 1976. The petition for a writ of certiorari was filed on July 6, 1976.

The jurisdiction of this Court is invoked under Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, as amended, 15 U.S.C. (Supp. V) 754(a)(1), which incorporates by reference Section 211(g) of the Economic Stablization Act of 1970, as added, 85 Stat. 750, 12 U.S.C. (Supp. V) 1904 note, and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether regulations under the Emergency Petroleum Allocation Act of 1973 that limit the price at which certain crude oil may be sold amount to a taking of petitioners' property, without just compensation, in violation of the Fifth Amendment.

STATUTES AND REGULATIONS INVOLVED

Section 4(a) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 629, as amended, 15 U.S.C. (Supp. V) 753(a), provides:

> Not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d) of this section, such regulation shall take effect not later than fifteen days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

The other relevant statutes and regulations are set forth at Pet. App. III, pp. 34-40.

STATEMENT

In response to the nationwide petroleum shortages caused in part by inadequate domestic production and the Arab oil embargo, in the fall of 1973 Congress enacted the Emergency Petroleum Allocation Act of 1973 (the "Allocation Act"), 87 Stat. 627, 15 U.S.C. (Supp. V) 751 *et seq.* The shortages were found to have

created "severe economic dislocations and hardships," and Congress directed that the authority granted under the Allocation Act "shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on * * * the domestic economy" (Section 2, 15 U.S.C. (Supp. V) 751).

Section 4(a) of the Allocation Act, 15 U.S.C. (Supp. V) 753(a), requires the President to promulgate regulations "providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts * * * and at prices specified in * * * such regulation[s]."

To minimize the inflationary impact of rising world oil prices and to provide the necessary incentive for increased domestic production of petroleum, the so-called "two-tier" pricing system for crude oil was established.[1] Under this system, "old" oil, that is, the amount of domestic crude oil extracted from properties up to their 1972 base production control levels, cannot be sold at prices in excess of a ceiling level of approximately $5.25 per barrel, which is substantially below the open market price. "New" crude oil, which is the amount of domestic

---

[1]The two-tier pricing system originally was established by the Cost of Living Council as a part of Phase IV of the Economic Stabilization Program, 6 C.F.R. Part 150, Subpart L (1974), 38 Fed. Reg. 22536. Pursuant to Section 5(b) of the Allocation Act, 15 U.S.C. (Supp. V) 754(b), the President established the Federal Energy Office ("FEO") and delegated to it all his authority under that Act. Executive Order 11748, 38 Fed. Reg. 33575. The FEO subsequently adopted the two-tier system without substantial change, 10 C.F.R. Part 212, Subpart D (1974), 39 Fed. Reg. 1924, as Congress had contemplated it would. See H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. (1973). FEO became the Federal Energy Administration ("FEA") pursuant to the Federal Energy Administration Act of 1974, 88 Stat. 96, 15 U.S.C. (Supp. V) 761 *et seq.*

crude oil extracted from a property in excess of its 1972 level, until recently was permitted to be sold in the open market, where it was subject to foreign competition but still commanded a substantial premium over the price of old oil.[2] The validity of the two-tier pricing system under the Act was upheld in *Consumers Union of the United States, Inc. v. Sawhill*, 525 F. 2d 1068 (T.E.C.A.) (*en banc*), vacating 512 F. 2d 1112.

Petitioners, royalty owners of interests in "old" crude oil, brought separate actions against the United States in the United States District Court for the Eastern District of Oklahoma, claiming that the restrictions on the prices at which the oil in which they have interests could be sold under the two-tier pricing system amounted to a taking of their property without just compensation, in violation of the Fifth Amendment. The district court ordered the complaints consolidated and, having determined that a substantial constitutional question was presented, certified the case to the Temporary Emergency Court of Appeals ("TECA").[3]

The TECA ruled that the case did present a substantial constitutional issue that had not previously been passed

---

[2]Title IV of the Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 941, amended various provisions of the Allocation Act, and was itself amended by the Energy Conservation and Production Act of 1976, Pub. L. 94-385, 90 Stat. 1125. None of these amendments is immediately relevant to any of the issues raised here.

[3]Section 211(c) of the Economic Stabilization Act, 12 U.S.C. (Supp. V) 1904 note, incorporated by reference into Section 5(a)(1) of the Allocation Act, 15 U.S.C. (Supp. V) 754(a)(1), provides that the district court shall certify to the TECA any case arising under the Allocation Act in which a "substantial constitutional issue exists." The district court ruled (Pet. App. II, pp. 31-33) that such an issue was posed in this case by petitioners' reliance on the Takings Clause of the Fifth Amendment.

upon (Pet. App. I, pp. 12-13), but it resolved that question against petitioners on the authority of its earlier decisions upholding other aspects of the petroleum allocation regulations against similar takings claims and remanded the case to the district court with instructions to dismiss the complaints (Pet. App. I, pp. 16-19).

ARGUMENT

The TECA correctly ruled that the two-tier pricing system does not amount to a taking of petitioners' property, and further review is unwarranted.

1. To achieve the Allocation Act's goals of dampening the inflationary impact of rising world oil prices while encouraging increased domestic production, the two-tier system incidentally restricts the profit that petitioners can realize on the sale of their crude oil. That system, however, reflects the proper exercise of lawful regulatory authority conferred by the Act. *Consumers Union of the United States, Inc.* v. *Sawhill, supra; Cities Service Company* v. *Federal Energy Administration*, 529 F. 2d 1016, 1020 (T.E.C.A.), certiorari denied, June 21, 1976 (No. 75-1230). Consequential injuries to petitioners resulting therefrom accordingly are not compensable under the Fifth Amendment. See *Knox* v. *Lee*, 12 Wall. 457, 551; *Block* v. *Hirsh*, 256 U.S. 135; *United States* v. *Central Eureka Mining Company*, 357 U.S. 155; *Goldblatt* v. *Hempstead*, 369 U.S. 590.

The constitutionality of petroleum allocation regulations[4] that have the incidental effect of limiting the price at which a refiner may dispose of its crude oil was established in *Condor Operating Company* v. *Sawhill*, 514 F. 2d 351 (T.E.C.A.), certiorari denied, 421

---

[4]The "December 1 Rule," 10 C.F.R. 211.63(a).

U.S. 976. Other regulations,[5] restricting the ability of refiners with disproportionate access to "old" oil from refining that lower priced oil at will and thereby gaining a larger market share or higher profit margins, were sustained as valid under the Act in *Pasco, Inc.* v. *Federal Energy Administration,* 525 F. 2d 1391 (T.E.C.A.), and were later upheld against the claim that they resulted in a taking of the affected refiners' property without just compensation. *Cities Service Company* v. *Federal Energy Administration, supra.* This case follows *a fortiori* from those decisions. As the court below correctly held (Pet. App. I, pp. 17-18; footnotes omitted):

> [O]ur previous rulings upholding in principle the validity of the two-tier system and related regulations as involving no unconstitutional taking and as being otherwise valid control the present cases. * * * [W]e * * * reiterate expressly in the broad context of the present cases that the two-tier pricing system is constitutional both as indicated by our prior rulings and because of the reasons set out in those rulings with reference to closely related problems.

2. Petitioners argue (Pet. 11-12) that the district court should not have certified the case to the TECA because it presented no substantial constitutional issue and that therefore the TECA lacked jurisdiction to consider it.[6] Petitioners premise their argument on the belief that they can at once concede the constitutionality of the two-tier system yet challenge it under the Takings Clause. This premise is unsound, as the court

---

[5]The Cost Equalization Program, 10 C.F.R. 211.67.

[6]See note 3, *supra.*

below correctly perceived (Pet. App. I, pp. 16-17; footnote omitted):

> The fatal flaw in [petitioners'] position is the assumption that the operation of the two-tier pricing system is lawful and constitutional and yet that it would give rise to an action for damages under the Tucker Act.* * * If the operation of the regulations is constitutional, as we have held, because it does not involve a taking of property without just compensation, but constitutes a legitimate exercise of the police power, the admission of this premise by the [petitioners] cannot convert the non-taking into a compensable taking.

Moreover, petitioners appear to concede (Pet. 6) that, had the case not been certified, the TECA would nonetheless have had appellate jurisdiction over it following its dispostion in due course by the district court. Petitioners do not claim (and in our view could not plausibly claim) that the outcome of the case would have been different had the TECA exercised its appellate jurisdiction later rather than sooner, and thus even if that court's review was premature no issue warranting this Court's review is presented.

3. Without suggesting what facts they might have adduced that could conceivably have altered the decision below, petitioners argue (Pet. 14-16) that, by deciding as a matter of law that the two-tier pricing system does not take their property within the meaning of the Fifth Amendment, the TECA has erroneously deprived them of their right to a jury trial on the same issue. The court below correctly analyzed this issue, however, when it said (Pet. App. I, p. 14) that a jury trial was unnecessary "[i]f * * * it is apparent as a matter of law that under facts reasonably * * * contemplated

within the purview of the complaints the [petitioners] cannot prevail on the theory thereby revealed." The complaints made allegations essentially similar to those in *Cities Service* and *Pasco* (see Pet. App. I, pp. 14-15), and at oral argument petitioners' counsel was unable to say what facts (other than those of which the TECA could take judicial notice) might be proved at a trial that would distinguish this case from those cases (*id.* at 15). In short, since petitioners failed to show that any facts material to disposition of their complaints were in dispute, they were not entitled to a jury trial and the TECA properly treated the takings issue as a threshold legal question that, when resolved against petitioners, ended the case.

4. Petitioners also assert (Pet. 10-11) that the decision below is in error because it "effectively has withdrawn the Tucker Act jurisdiction otherwise available to plaintiffs to seek just compensation for an alleged taking of their property."

This case, however, presents no occasion to consider what effect, if any, enactment of the Allocation Act has had upon the jurisdiction and remedies provided for under the Tucker Act (28 U.S.C. 1346 and 1491). The decision below cannot be said to have passed upon this issue (see, *e.g.*, Pet. App. I, p. 12). More importantly, since, for the reasons stated above, the two-tier pricing system does not constitute a compensable taking under the Fifth Amendment, petitioners would not be entitled to any remedy under the Tucker Act even assuming that jurisdiction under that Act has not been withdrawn by the Allocation Act. Thus there is no reason to consider the relationship between the two Acts in the context of this case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

REX E. LEE,
Assistant Attorney General.

LEONARD SCHAITMAN,
LINDA PENCE,
Attorneys.

OCTOBER 1976.